

March 16, 2017

*Via First Class Mail*

Peter E. Keibel, District Coordinator  
District Commission 4  
111 West Street  
Essex Junction, VT 05452

**Re: Jurisdictional Opinion request for BTC Mall Associates, LLC regarding Burlington Town Center Development; Opposition to Mr. Franco JO Request**

Dear Peter,

I am writing on behalf of BTC Mall Associates, LLC (BTC) to request a Jurisdictional Opinion (“JO”) pursuant to 10 V.S.A. § 6007 with regard to the planned redevelopment of the Burlington Town Center mall. Enclosed please find a Priority Housing Project Worksheet from the Natural Resources Board.

BTC also responds to a request for a Jurisdictional Opinion by Mr. Franco dated March 13, 2017 concerning property owned by BTC. Mr. Franco’s request seeking an opinion that an Act 250 permit is required for BTC’s proposed redevelopment should be denied. Any facts asserted by Mr. Franco concerning BTC’s project should not be relied upon as a basis for determining jurisdiction as BTC’s representations contained in the enclosed worksheet should control, and conform with the project as approved by the City of Burlington, Development Review Board (DRB) earlier this week. The project description reviewed by the DRB is available at [https://www.burlingtonvt.gov/sites/default/files/Agendas/SupportingDocuments/BTC%202017\\_02\\_16%20P%26Z%20NARRATIVE.pdf](https://www.burlingtonvt.gov/sites/default/files/Agendas/SupportingDocuments/BTC%202017_02_16%20P%26Z%20NARRATIVE.pdf).

Mr. Franco’s five arguments that the proposed project does not qualify as a Mixed-Use Priority Housing Project are without merit, and should be rejected. Mr. Franco’s reliance on your January 11, 2016 JO is also wrong since the JO is not binding, and is no longer current in light of the changes made to the project prior to the City’s DRB approval.

Only land use projects that meet the definition of “development” require an Act 250 permit. 10 V.S.A § 6081(a). In Burlington, a Priority Housing Project with fewer than 275 units of housing does not require an Act 250 permit because it is not “development” pursuant to 10 V.S.A. § 6001(3)(A)(iv). A Priority Housing Project is a “mixed use” project located entirely in a designated downtown development district. 10 V.S.A. § 6001(35)(A). Under Act 250, “mixed use” means construction of both mixed income housing and construction of space for any combination of retail, office, services, artisan, and recreational and community facilities, provided at least 40 percent of the gross floor area of the buildings involved is mixed income housing. “Mixed use” does not include “industrial use.” 10 V.S.A. § 6001(28). “Mixed-income housing” that is for rent requires “at least 20

percent of the housing units that are rented constitute affordable housing and have a duration of affordability of no less than 20 years.” 10 V.S.A. § 6001(27)(B). When rented, “affordable housing” units are defined as “rented by the occupants whose gross annual household income does not exceed 80 percent of the county median income, or 80 percent of the standard metropolitan statistical area income if the municipality is located in such an area, as defined by the U.S. Department of Housing and Urban Development, and the total annual cost of the housing, including rent, utilities, and condominium association fees, is not more than 30 percent of the gross annual household income.” 10 V.S.A. § 6001(29)(B). As the enclosed Priority Housing worksheet indicates, BTC’s project satisfies each of the elements required to be a Priority Housing Project and therefore is not “development” subject to a permit under Act 250.

Mr. Franco presumes that the threshold jurisdictional question here is not whether BTC’s project constitutes development, but whether it constitutes a change to an existing project requiring a permit amendment under 10 V.S.A. § 6081(p). Ultimately, it is immaterial whether we are dealing in primary or amendment jurisdiction: section 6081(p) provides an exemption from amendment jurisdiction that is coextensive with the exemption from primary jurisdiction embedded in the definition of “development.” Section 6081(p) provides:

No permit or permit amendment is required for any change to a project that is located entirely within a downtown development district designated pursuant to 24 V.S.A. § 2793, if the change consists exclusively of any combination of mixed use and mixed income housing, and the cumulative changes within any continuous period of five years, commencing on or after the effective date of this subsection, remain below the jurisdictional threshold specified in subdivision 6001(3)(A)(iv)(I) of this title.

The section 6081(p) exemption sets forth the same criteria as the Priority Housing provisions of section 6001: a combination of mixed use and mixed income, within the Priority Housing jurisdictional thresholds. The obvious intent of the exemption is to extend Act 250’s Priority Housing provisions to redevelopment projects, in addition to new projects—indeed, given that Priority Housing is premised on a project being located in a downtown development district, it would severely undercut the Legislature’s intentions if redevelopment projects were subject to different criteria than new development projects. That interpretation is supported by section 6081(o), which makes clear that a Priority Housing Project will become subject to amendment jurisdiction if the underlying downtown development district designation is withdrawn.

Mr. Franco’s arguments also misconstrue the statute. The statute does not prohibit Priority Housing Projects from including new streets or parking garages. New street connections and parking garages are not independent commercial land uses in a mixed-use development. Streets and parking garages are land uses that support other land uses, which in the case of BTC’s project include residential (Mixed-Income Housing), retail, and office space. Mr. Franco’s argument would lead to the absurd result that mixed-use projects could not include new roads or parking garages to access the housing, retail, office, and other uses. Of course, this is not the legislature’s intent.

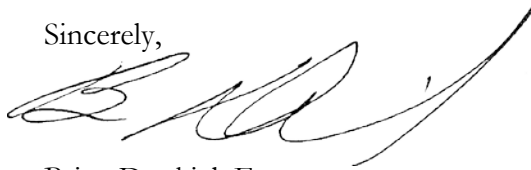
Mr. Franco’s argument that parking is “typically” included in rental housing and “implicitly” assumed in affordability is meritless, not supported by any facts, and provides no basis to conclude that BTC’s project is not a Priority Housing Project exempt from Act 250. The statute considers the “total annual cost of the housing, including rent, utilities, and condominium association fees.”



There is no basis to conclude that the cost of parking a car should be included in the annual cost of housing. Moreover, the project's Mixed-Income Housing will be offered at rents substantially below the threshold in Act 250, given Burlington's lower income threshold for inclusionary zoning.

Please don't hesitate to call if you have any questions. Thank you.

Sincerely,

A handwritten signature in black ink, appearing to read "B Dunkiel", written in a cursive style.

Brian Dunkiel, Esq.

DUNKIEL SAUNDERS ELLIOTT RAUBVOGEL & HAND, PLLC

Enclosure





## **Priority Housing Project Worksheet**

### **Project Description**

Devonwood Investors, LLC proposes to develop a multi-use project within the Downtown Mixed Use Core Overlay (DMUC) District and within the Downtown Development District on the project site presently occupied by Burlington Town Center Mall at 75 Cherry Street. The proposed uses include retail, residential, and office.

Priority Housing Projects are subject to specific Act 250 jurisdictional thresholds, based on the number of units and population. See 10 V.S.A. § 6001(3)(A)(iv).

Priority Housing Projects<sup>1</sup> must be in one of the following state-designated centers pursuant to Chapter 76A:

1. Downtown Development District, New Town Center, Growth Center, or Village Center associated with a Neighborhood Development Area; or
2. Vermont Neighborhood or Neighborhood Development Area.

If in a state-designated Downtown Development District, New Town Center, Growth Center, or Village Center associated with a Neighborhood Development Area, the Project must be Mixed Income Housing or Mixed Use to constitute Priority Housing. See below to demonstrate that the Project is Mixed Income Housing or Mixed Use.

If in a state-designated Vermont Neighborhood or Neighborhood Development Area, the Project must be Mixed Income Housing to constitute Priority Housing. See below to determine if the Project is Mixed Income Housing.

## Priority Housing Project Worksheet

### Mixed Use<sup>ii</sup>

A mixed use project cannot include industrial use, and must include at least 40% of gross floor area as Mixed Income Housing.

- *If claiming Mixed Use, please list the uses (e.g., retail, office, artisan, total housing, Mixed Income Housing), and the gross floor area of each.*

<u>Use</u>	<u>Gross Floor Area (sq. ft.)</u>	<u>Percentage</u>
Mixed-Income Housing	416,263	42.52%
Office	434,603	44.39%
Retail	126,813	12.95%
Observation Deck	1,350	0.14%
<b>Total Project Area</b>	<b>979,029</b>	<b>100%</b>

- *For any Mixed Income Housing, please provide information set forth below.*

### Mixed Income Housing<sup>iii</sup>

There are two types of Mixed Income Housing: Rental housing and owner-occupied housing.

*For owner-occupied housing:*

- *What is the current VHFA new construction, targeted area purchase price limit?*
- *Please demonstrate that:*
  - o *Initial purchase price for at least 15% of units is no greater than 85% of the current VHFA price limit; or*
  - o *Initial purchase price for at least 20% of units is no greater than 90% of the current VHFA price limit.*

The Project does not include any owner-occupied housing.

*For rental housing:*

- *How many units constitute Affordable Housing?*
- *Please demonstrate that:*
  - o *At least 20% of the housing units constitute Affordable Housing (see below); and*
  - o *The duration of affordability is at least 20 years.*

## Priority Housing Project Worksheet

The Project will include 272 apartments, 55 (20.22 percent) of which will be permanently affordable.

### **Affordable Housing**<sup>iv</sup>

There are two types of Affordable Housing: rental housing and owner-occupied housing.

- *If the Project is in a metropolitan statistical area, what is the current standard metropolitan area statistical income?*

The FYI 2016 median income is \$84,000. See City of Burlington, Vermont, 2016 HUD Income Limits, <https://www.burlingtonvt.gov/CEDO/2016-HUD-Income-Limits-0> (accessed March 9, 2017).

- *If the Project is not in a metropolitan statistical area, what is the current county median income?*

Not applicable.

## Priority Housing Project Worksheet

*For rental housing, please provide the following information:*

- *Please demonstrate that the housing will be rented by occupants whose gross annual household income does not exceed 80% of county median income or 80% of metropolitan area statistical income, as applicable.*
- *What is the total annual cost of the housing, including rent, utilities, and condominium association fees?*
- *Please demonstrate that the total annual cost of the housing, including rent, utilities, and condominium association fees, will be no greater than 30% of the renters' gross annual household income.*

In accordance with Burlington's inclusionary zoning ordinance, *Burlington Comprehensive Dev. Ord. § 9.1.11(a)*, 55 (20.22 percent) of the Project's residential units will be rented to occupants whose income does not exceed 65 percent of Burlington's metropolitan area statistical income—a more rigorous standard than Act 250's 80 percent standard. The total cost of the Project's affordable units, including rent and utilities, will be no greater than 30 percent of these renters' gross annual household income. There will be no condominium fees associated with any of the Project's residential units.

Devonwood Investors, LLC may seek federal tax credits imposing a still more stringent standard, requiring affordable units to be rented to households earning less than 60 percent of median income. At that income level, the maximum allowable rents are \$945 for a one-bedroom unit, and \$1,134 for a two-bedroom unit. These amounts would be well under Act 250's affordability maximum.

*For owner-occupied housing, please provide the following information:*

- *Please demonstrate that the housing will be owned by occupants whose gross annual household income does not exceed 80% of county median income or 80% of metropolitan area statistical income, as applicable.*
- *What is the total annual cost of the housing, including principal, interest, taxes, insurance, and condominium association fees?*
- *Please demonstrate that the total annual cost of the housing, including principal, interest, taxes, insurance, and condominium association fees, will be no greater than 30% of the owner's gross annual household income.*

Not applicable.

## Priority Housing Project Worksheet

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<sup>i</sup> (35) "Priority housing project" means a discrete project located on a single tract or multiple contiguous tracts of land that consists exclusively of: (A) mixed income housing or mixed use, or any combination thereof, and is located entirely within a designated downtown development district, designated new town center; designated growth center, or designated village center that is also a designated neighborhood development area under 24 V.S.A. chapter 76A; or (B) mixed income housing and is located entirely within a designated Vermont neighborhood or designated neighborhood development area under 24 V.S.A. chapter 76A. 10 V.S.A. § 6001(35).

<sup>ii</sup> (28) "Mixed use" means construction of both mixed income housing and construction of space for any combination of retail, office, services, artisan, and recreational and community facilities, provided at least 40 percent of the gross floor area of the buildings involved is mixed income housing. "Mixed use" does not include industrial use. 10 V.S.A. § 6001(28).

<sup>iii</sup> (27) "Mixed income housing" means a housing project in which the following apply: (A) Owner-occupied housing. At the option of the applicant, owner-occupied housing may be characterized by either of the following: (i) at least 15 percent of the housing units have a purchase price which at the time of first sale does not exceed 85 percent of the new construction, targeted area purchase price limits established and published annually by the Vermont Housing Finance Agency; or (ii) at least 20 percent of the housing units have a purchase price which at the time of first sale does not exceed 90 percent of the new construction, targeted area purchase price limits established and published annually by the Vermont Housing Finance Agency; (B) Rental Housing. At least 20 percent of the housing units that are rented constitute affordable housing and have a duration of affordability of no less than 20 years. 10 V.S.A. § 6001(27).

<sup>iv</sup> (29) "Affordable housing" means either of the following: (A) Housing that is owned by its occupants whose gross annual household income does not exceed 80 percent of the county median income, or 80 percent of the standard metropolitan statistical area income if the municipality is located in such an area, as defined by the U.S. Department of Housing and Urban Development, and the total annual cost of the housing, including principal, interest, taxes, insurance, and condominium association fees, is not more than 30 percent of the gross annual household income. (B) Housing that is rented by the occupants whose gross annual household income does not exceed 80 percent of the county median income, or 80 percent of the standard metropolitan statistical area income if the municipality is located in such an area, as defined by the U.S. Department of Housing and Urban Development, and the total annual cost of the housing, including rent, utilities, and condominium association fees, is not more than 30 percent of the gross annual household income. 10 V.S.A. § 6001(29).